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## A STEP TOWARD FAIRNESS IN CAPITAL LITIGATION: MISSOURI RESOURCE CENTER

SEAN D. O'BRIEN†

### INTRODUCTION

The Missouri Capital Punishment Resource Center was recently established to address the critical need for competent representation in capital cases in Missouri. It is part of a nationwide effort to ensure competent legal representation for death row inmates.<sup>1</sup> Although the Resource Center is authorized to provide direct representation to death row inmates, it will act mainly as a training and support facility for appointed counsel. The reader will better understand the purpose and the function of the Resource Center from a brief discussion of the problems which prompted the creation of the Center.

The 1980s saw a steady trend toward the increasing use of capital punishment. After the revival of capital punishment in 1977, it took five years to add the first eighteen prisoners to Missouri's death row. In the early 1990s, we can expect to see fifteen to twenty persons added to death row each year. Missouri's first post *Furman v. Georgia*<sup>2</sup> execution took place in January 1989.<sup>3</sup> Less than a month into the 1990s, Missouri's second execution took place.<sup>4</sup> There are several prisoners whose executions are very likely to follow before the close of 1990.

As in all demographic phenomena, we are seeing today the results of a chain of events put in motion a few years earlier.

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1. Other Resource Centers have opened in Arizona, California, Alabama, Georgia, North Carolina, South Carolina, Florida, Louisiana, Tennessee, Texas, Oklahoma and Mississippi. Funding has recently been authorized for Resource Centers in Illinois and Ohio. The address of the Missouri Resource Center is 500 E. 52nd Street, P.O. Box 22609, Kansas City, Missouri, 64113-2609, Telephone Number (816) 276-2383.

2. 408 U.S. 238 (1972).

3. George "Tiny" Mercer was executed in January 1989.

4. Gerald Smith was executed in January 1990.

Assuming that post-conviction challenges to death sentences all progress through the system at a comparable rate, within the next two to three years we can expect to see one or more executions take place each month. The number could be much higher in light of Missouri's abbreviated post-conviction review procedures which became effective January 1, 1988.<sup>5</sup>

The challenge facing the Missouri Bar and the courts in the 1990s is whether we can provide adequate legal representation to the seventy-five men, women and children now awaiting execution and the many more who will join their ranks on death row in the coming years. The State Public Defender does not provide counsel in federal habeas corpus cases, and historically has lacked sufficient funds to provide competent representation to all capital litigants in state court.<sup>6</sup> The Federal Public Defender in the Western District is unable to assume responsibility for death penalty habeas corpus cases because of its already heavy caseload. The Federal Public Defender in the Eastern District also has a heavy caseload, but has nevertheless been saddled with the responsibility for three death penalty habeas corpus petitions. Many of the larger firms in St. Louis and Kansas City are already engaged in death penalty representation, and feel unable to handle additional cases. Attorneys practicing in smaller firms tend to shy away from accepting appointments in capital cases because of the complexity and expense involved, although a number of lawyers in small firms have taken on more than their fair share of these cases.<sup>7</sup> In spite of the firms and solo practitioners that have agreed to serve in the past, the problem remains critical because the list of attorneys willing and able to represent death row inmates is shrinking, while the need for such attorneys is rapidly growing.

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5. Mo. R. ANN. 24.035 (Vernon 1981 & Supp. 1989) (applicable where a prisoner challenges a conviction after a guilty plea) and Mo. R. ANN. 29.15 (Vernon 1981 & Supp. 1989) (applicable where a person challenges a conviction after a trial) require that the prisoner's post-conviction relief motion be filed within 30 days of the filing of the transcript on appeal. All subsequent post-conviction procedures are subject to an extremely brief time table, and the trial court's findings of fact, conclusions of law and judgment are reviewed along with the direct appeal.

6. At one point in 1988, there were twenty-two inmates on death row who had no counsel whatsoever assigned to their cases.

7. The Resource Center is currently working with one attorney in a three-lawyer firm who is handling his fifth or sixth appointed habeas corpus case for death row inmates. The Center is assisting several other attorneys who are similarly situated.

An additional factor which contributes to the crisis in capital representation is the demanding nature of the litigation. Litigation pertaining to the execution of people convicted of capital crimes is qualitatively different from a sentence of imprisonment.<sup>8</sup> It is different not only in the nature and quality of the punishment, but also in the volume and complexity of factual and legal issues with which appointed lawyers must become familiar in order to do a minimally competent job. The typical attorney's view toward being on the receiving end of a capital appointment is summed up by Judge John Godbold:

Taking a habeas death case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis. Third, the death penalty just isn't imposed any more on people for trivial things. The community is often inflamed. The press is often inflamed. The state trial judge is often inflamed if you question what he did. The trial counsel is often inflamed if you must question what he did. Your client seldom appreciates what you do and may end up accusing you of being ineffective counsel.<sup>9</sup>

It is not surprising that the burden of representing death row inmates in the past decade has been carried by a handful of dedicated lawyers.<sup>10</sup>

The system for providing representation to indigent persons

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8. All lawyers are familiar with the oft-cited statement of the United States Supreme Court that death is different:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

9. "You Don't Have to Be a Bleeding Heart" *Representing Death Row: A Dialogue Between Judge Abner J. Mikva and Judge John C. Godbold*, 14 HUMAN RIGHTS, 22, 24 (Winter 1987) [hereinafter *Representing Death Row*].

10. The shortage of competent and willing attorneys was addressed by Justice Thurgood Marshall in his remarks to the Second Circuit Judicial Conference:

[C]apital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases. Death penalty litigation has become a specialized field of practice and expensive. And even the most well-intentioned attorneys often are unable to recognize, preserve and defend their clients' rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases.

Counsel, whether appointed or retained, often are handling their first

in Missouri criminal courts has been in a constant state of crisis for most, if not all, of the last decade. In ruling on an attorney's challenge to a court order requiring him to serve without fee or reimbursement of expenses, the Missouri Supreme Court observed:

At the present time, the Court is becoming inundated with cases similar in nature involving non-payment of fees for the defense of the indigent. They include cases where accused indigents are being deprived of a reasonable defense by reason of lack of available funds necessary to prepare a proper defense for the accused and cases where lawyers are alleging that they are being denied the right to earn a livelihood for their family or in effect are being placed in involuntary servitude contrary to the thirteenth amendment to the United States Constitution. Because of insufficient funding of the Public Defender Program for the defense of indigents, the problem is currently approaching crisis proportion.

In this background, the Court has concluded that the processing of the voluminous pending and threatened cases

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criminal cases, or their first murder cases. When confronted with this, the prospect of a death penalty is ominous.

Though acting in good faith, they often make serious mistakes. Thus, in capital cases I have read, counsel have simply been unaware that certain death penalty issues are pending before the appellate courts and that the claims should be preserved; that certain findings by a jury might preclude imposition of a death penalty; or that a separate sentencing procedure or phases of the litigation must follow a conviction. The federal reports are filled with stories of counsel who presented no evidence in mitigation of their clients' sentences, simply because they did not know what to offer or how to offer it, or had not read the state sentencing statute.

.....  
Trial counsel's lack of expertise takes a heavy toll. A capital defendant seeking post-conviction relief is, today, caught up in an increasing pernicious visegrip. . . .

.....  
As a consequence, many capital defendants find that errors by their lawyers preclude presentation of substantial constitutional claims, but that such errors—with the resulting forfeitures of rights—are not enough in themselves to constitute ineffective assistance.

To quote a recent commentary, "There is little the experienced lawyer can do but regret the failure to preserve rights and to go through the paces of yet another futile round of litigation."

T. Marshall, Remarks at the Second Circuit Judicial Conference (September 6, 1985), reprinted in 109 F.R.D. 443, 444-45 (1986).

Although Justice Marshall's remarks are directed toward defense counsel at trial, they are equally applicable to counsel at state and federal post-conviction stages of capital proceedings. Judge Godbold observed that "the average trial lawyer . . . doesn't know any more about habeas than he [or she] does about atomic energy." *Representing Death Row*, *supra* note 9, at 24.

concerning representation of the indigent is neither economically desirable for the state nor is it in the best interest of the indigent accused, the legal profession, or the public.<sup>11</sup>

Although recognized by the Missouri Supreme Court in 1981, the funding crisis on indigent defense services was not addressed for a number of years. In a 1988 study of state indigent defense services, Missouri ranked 49th in its per capita funding for appointed counsel.<sup>12</sup>

Not surprisingly, the funding crisis is reflected in the quality of defense available to defendants in capital cases. Kenneth Kenley, now on death row, was defended by an assistant public defender who had graduated from law school nine months before the trial and who was unassisted by any other attorney.<sup>13</sup> Recently, Kenley was denied habeas corpus review of twenty-six alleged constitutional violations because of his inexperienced trial lawyer's failure to raise his constitutional claims at trial.<sup>14</sup> In another case, a lawyer failed to introduce evidence of his client's mental retardation in the penalty phase of a capital trial which ended in a death verdict.<sup>15</sup> Many other inmates on death row have been defended by attorneys who were unskilled, inexperienced, or lacked the resources to competently defend a capital case.

It is this environment that gave birth to the concept of a death penalty resource center:

[L]awyers should not be faulted for their services to indigent condemned prisoners in attempting to set aside a capital sentence. Courts appoint lawyers to serve these prisoners to assure that no condemned person shall die by reason of an unconstitutional process. It is important to understand the serious nature of the voluntary service involved. The American Bar Association has initiated, and the Judicial Conference of the United States has supported, the establishment of Death Penalty Resource Centers. The purpose of these Centers is to increase the availability of

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11. State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 66 (Mo. 1981) (en banc).

12. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR, 1986 5, Table 6 (Sept. 1988).

13. State v. Kenley, 693 S.W.2d 79 (Mo. 1985) (en banc), *cert. denied sub nom.* Kenley v. Missouri, 475 U.S. 1098 (1986).

14. Kenley v. Armontrout, No. 88-2298C(3), slip op. at 8-11 (E.D. Mo. filed July 12, 1989).

15. State v. Shaw, 636 S.W.2d 667, 672-73 (Mo. 1982) (en banc).

competent attorneys to review the state processes and assure competent and effective representation of individuals sentenced to death. This project is inspired by the fact that competent representation is difficult to secure. The scarcity of volunteers among lawyers is understandable considering the fact that the average time that a competent lawyer labors in post-conviction review of a single death sentence is approximately one-quarter of a lawyer's billable hours for one year.<sup>16</sup>

In response to the crisis in the representation of capital defendants, a committee of the Missouri Bar, chaired by Senator Thomas Eagleton, proposed the creation of a Resource Center in Missouri. The work of the committee culminated in the creation of the Missouri Capital Punishment Resource Center.<sup>17</sup> The committee endorsed a proposal for a Resource Center designed to improve the system of justice by recruiting and screening attorneys qualified to accept court appointments in death penalty cases, providing legal advice and other litigation support services from qualified attorneys, and training lawyers and law students in death penalty litigation. The Resource Center's mission is described in detail in the following sections.

## GOALS OF THE MISSOURI RESOURCE CENTER

### *Recruitment, Screening and Matching of Attorneys*

Recruiting lawyers to accept habeas corpus appointments in capital cases is a complex undertaking. The Resource Center will try to develop a list of lawyers who are not only willing to handle the cases, but who are also skilled and experienced enough to handle them effectively. Statutory guidelines have been established to reduce the likelihood that appointments will go to attorneys who are not qualified to handle them.<sup>18</sup>

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16. *Mercer v. Armontrout*, 864 F.2d 1429, 1433 (8th Cir. 1988).

17. Maurice Graham, then president of the Missouri Bar, Robert Popper, Dean of the University of Missouri-Kansas City, School of Law, and professors Ellen Suni, Nancy Levit, Dennis Corgill, Chris Hoyt and Pat Harris each contributed substantially to designing and implementing a Resource Center that would most effectively deal with the needs in Missouri. A number of other people, too numerous to name, contributed to the creation of the Resource Center. Each deserves credit, though an attempt to list all would undoubtedly result in an unintentional slight by omission.

18. Title 21 of the United States Code provides:

(B) In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is

The statute should have a positive effect on the quality of counsel appointed in capital post-conviction cases and the resources available to him or her. While these statutory guidelines will have a beneficial effect on the quality of representation in a pending case, they cannot be followed in every case without a substantial increase in the number of lawyers available.

The Resource Center is developing a list of attorneys who have expressed a willingness to accept habeas corpus appointments and who meet the statutory qualifications. We are making certain that attorneys who express an interest in handling these cases understand the magnitude of the commitment involved. Unfortunately, the list of attorneys who have responded to our initial inquiries is still too short to accommodate all of the twelve to fifteen death inmates who are expected to file habeas corpus petitions within the next six months.

A positive development that will aid in the recruitment function is the amendment of provisions pertaining to fees for court-appointed attorneys in death penalty habeas corpus cases in federal court. The hourly rates of compensation authorized are substantially higher than those paid for other kinds of appointments, and the ceiling imposed on court-appointed lawyer fees does not apply to capital cases.<sup>19</sup> Although

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or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

21 U.S.C. § 848(q)(4)(B) (1988).

19. Title 21 of the United States Code provides:

(9) Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on



it is difficult to predict whether and to what extent judges will continue to reduce fee vouchers, the situation should improve dramatically.

The Center will also attempt to match death penalty litigants with lawyers who are able to effectively handle their particular case. The Resource Center will track cases from the early stages in state court and determine if the effective representation of the client will be facilitated by assigning the case to a lawyer with expertise in a particular area.

### *Assistance to Attorneys*

Probably the most important aspect of the Resource Center is the advice and assistance it will provide to appointed counsel. More staff attorney hours will be devoted to this function than any other part of the Center's operation. The Center will not recruit lawyers to take these cases and then subject them to the swim or drown school of capital litigation. The Center will assist in the identification of important constitutional issues and provide guidance with respect to procedural matters, legal research, drafting pleadings and locating expert witnesses.<sup>20</sup> The Resource Center will strictly observe any work-product or attorney-client privilege that may apply to any assistance we render. All requests for assistance will be kept confidential.<sup>21</sup>

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behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

*Id.*

20. There are four attorneys at the Resource Center available for consultation and technical assistance.

21. While the Center welcomes any and all requests for assistance from defense lawyers, it is important that attorneys using our services understand that due to the complexity of capital litigation, many matters may not be appropriately handled in an isolated telephone call. Just as a corporate lawyer would not be inclined to give legal advice about a hostile corporate takeover without reviewing a substantial amount of data, we may want to review the legal file or transcript in a particular case before giving assistance or advice.

### *Training*

Another function of the Resource Center will be to serve as a training facility for private attorneys representing death row inmates. The Center will participate in workshops and seminars for attorneys which will focus on issues of special concern to those involved in this highly specialized field of practice. By the time this piece appears in print, the Resource Center will have a number of training programs scheduled. We will endeavor to make these programs available throughout the state.

The Resource Center is actively involved in two course offerings at the University of Missouri-Kansas City School of Law. The Death Penalty/Post-Conviction Seminar focuses on current issues in death penalty law and litigation, including state and federal post-conviction procedures. Students in the Capital Representation Clinic work on specific cases or projects under the direct supervision of Resource Center Staff Attorneys.<sup>22</sup> Although the Resource Center is organized as a not-for-profit corporation and is not affiliated with the University of Missouri, its presence at the law school is without doubt a mutually beneficial arrangement. Attorneys who seek the help of the Resource Center will benefit from the expertise of faculty members with experience and interest in death penalty matters and federal habeas corpus.<sup>23</sup>

### CONCLUSION

The Resource Center has been designated a Community Defender Organization in accordance with the Federal Rules of Criminal Procedure and the local rules of the United States District Courts for the Eastern and Western Districts of Missouri. The mission of the Resource Center is an ambitious and difficult one. Although it has been in existence a very short

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22. The Resource Center also has four part-time law students on its staff. The students are making valuable contributions to the Resource Center, and at the same time taking advantage of a rare learning opportunity.

23. Ellen Suni has authored two articles about the death penalty in Missouri and will publish a third in the summer 1989 issue of the *University of Missouri Law Review*. She has served as an assistant U.S. Attorney and has done extensive research on death penalty issues. Robert Popper, Dean of the University of Missouri-Kansas City School of Law, is a noted expert on post-conviction remedies, having authored articles and a book on the subject. He is experienced in the trial and appeal of capital cases. Professor Nancy Levit has written an article on post-conviction procedures in capital cases and has served as a consultant in capital litigation. All three serve in an advisory capacity on the Resource Center's Board of Directors.

time, it is already providing assistance to lawyers in a number of cases. However, the success of all the Resource Centers, and of the system of justice, depends entirely on the active participation of the Bar. The Missouri Bar has a long tradition of striving to make legal services available to all persons who are in need of them. The support that the Missouri Bar has given the Missouri Resource Center is a meaningful continuation of that tradition.

Although the Resource Center enjoys broad support among the Bar, concern has been expressed that the Resource Center may end up as a tool for the prosecution to speed up the process of execution or as a tool for death row inmates to prolong the litigation. Dean Robert Popper, University of Missouri-Kansas City School of Law, recently addressed those concerns:

I have been asked by some staunch advocates of the death penalty whether the Center will be a mechanism for introducing more delay into the system of justice. Others—those who oppose capital punishment—have expressed concern that the Center might improve the efficiency of the system so that executions will be expedited.

The Center's involvement in a particular capital case might result in shortening or extending the time between the imposition and the execution of the sentence. But in truth, it is not a project designed either to frustrate or to grease the wheels of justice. Its sole purpose is to accomplish what lawyers everywhere will agree is a desired goal: an improved quality of legal representation. Its only ideology is to further the cause of justice by helping to ensure that defense counsel appointed to participate at the federal habeas corpus stage perform at the highest level of effectiveness.<sup>24</sup>

By striving to improve the quality and availability of counsel to persons accused of capital crimes, the Resource Center will be advancing the well-settled obligations of the legal profession:

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in

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24. Popper, *News & Views from the Dean: The Death Penalty and the Law School—A Non-Ideological Project*, KANSAS CITY METROPOLITAN BAR ASSOCIATION BULLETIN 20 (Oct. 1989).

the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.<sup>25</sup>

There should be nothing controversial about that.

Because the Resource Center will be providing legal assistance and litigation support services, the question of ideology of the Center or individual attorneys has little relevance. Any lawyer or firm having responsibility to individual clients must be guided by the interest of each client and the ethical obligation of all lawyers to zealously represent that client within the bounds of the law. What the system can expect of the Resource Center is no less than what it requires of all lawyers: loyalty to the client, and integrity to the system of justice. In addition, the Resource Center will make special efforts to forward the obligation of all lawyers to improve the system of justice and make legal services available to all who are in need of them, no matter how unworthy we may judge them to be.

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25. MO. R. ANN. 4, 6.1, Comment (Vernon Supp. 1989).

